IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 526.

HENRY MERRITT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

Statement of Facts.

The Court of Claims sustained a demurrer filed by the United States to the petition of the plaintiff therein and rendered the following opinion, in part:

> "1. The facts averred to do not show a contract, express or implied, between the plaintiff and the United States.

"2. It appears that the Government paid the prime contractor the price for the goods delivered, and if the prime contractor imposed upon plaintiff that fact does not give a cause of action against the defendants."

ARGUMENT.

The first ground is advanced by the Court below and the demurrer sustained *and the facts are not before the court,* although the petition alleges in paragraph 4—

> "that thereafter the Secretary of War proceeded to determine and settle the liability of the United States to claimant and the said Panama Knitting Mills Company, the prime contractor as aforesaid, under the contract aforesaid, under the provisions of the aforesaid Act of March 2, 1919, and did order claimant to deliver for the use of the United States, at the contract price of $3.20 per yard as aforesaid and which claimant did, 7,442⅞ yards of the said khaki cloth, for which the War Department paid to the Panama Knitting Mills Company for the account of claimant, $3.20 per yard or $23,817.20 plus $579.19 carrying charges for the five months, said cloth having been held by claimant for delivery awaiting adjustment, which settlement claimant is informed was Cancellation Agreement B-148, dated June 23, 1919, Purchase Section, War Department Claims Board."

The order for and the delivery of the goods was after the old or prime contract had been suspended. (See paragraph 3 of the petition.) When the War Department ordered claimant to deliver the goods he had on hand, as alleged in paragraph 4 of the petition, above set out, although he had been a subcontractor before, there was a new and an origi-

nal contract, which was completed by the delivery of the goods. Delivery of the goods was made by claimant, as he was instructed by the War Department, DIRECT TO THE UNITED STATES, and the facts will show, as alleged in paragraph 4 of the petition, that the goods were delivered "FOR THE USE OF THE UNITED STATES." The price was fixed and agreed upon by claimant and the War Department, and the contract was complete with the delivery of the goods. There was nothing more that claimant could do.

The Act of March 2, 1919 (40 Stat., 1272), in section 4, provides that before payment could be made to a prime contractor for the account of any subcontractor, and this act was the authority under which the War Department was adjusting or settling these claims and contracts, the consent of the ascertained subcontractor should be first had and obtained. By common consent of the parties and for the convenience of the Government, the old prime contractor, the Panama Knitting Mills Company, out of whose contract and the cancellation thereof the new one with claimant was made, was designated the agency through whom payment would be made.

Claimant had a good cause of action against the paying agent until the Government intermeddled and took, for no reason and without consideration or right, the money or fruit of the fraud of the paying agent, the Panama Knitting Mills Company. The action of the Government gives claimant the right of redress against it under both the general jurisdiction of the Court of Claims and the aforesaid Act of March 2, 1919, because such action amounts to a failure of payment by the Government to claimant for the goods delivered as agreed. Surely the Government cannot contend

that there are any rights it can be subrogated to under the fraud of the paying agent on claimant, who has "at all times borne true allegiance to the Government of the United States" (paragraph 8 of the petition).

This Court has said:

> "The interposition of equity is not necessary where a trust fund is perverted. The *cestui que trust* can follow it at law as far as it can be traced. May *vs.* Le Claire, 11 Wall., 217; Taylor *et al. vs.* Plummer, 3 Mau. & Sel., 562," * * * "But surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party." U. S. *vs.* State Bank, 96 U. S., 30, 35, and 36.

The Congress charged the Secretary of War and the Court of Claims that in determining or settling or adjusting claims under the said Act of March 2, 1919, to do so upon a "fair and equitable basis," and this duty cannot be escaped.

The United States is liable for the value thereof when it takes or accepts goods at an agreed price, as it did in this case, no matter what happens before or after the taking or acceptance, when no fraud or injury has been done to the United States.

Respectfully submitted,

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L. A. WIDMAYER,
Attorneys for Henry Merritt, Plaintiff.

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REPLY BRIEF FOR APPELLANT.

L. A. WIDMAYER,
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REPLY BRIEF FOR APPELLANT.

The United States contends that no cause of action has been set up by the facts stated in appellant's petition, and that the demurrer of the Government should be sustained.

The petition alleges that the Secretary of War ordered appellant, the subcontractor, to furnish and deliver for the use of the United States 7,442⅞ yards of khaki cloth; that the appellant did actually so furnish and deliver said yardage *for the use of the United States;* that the United States then paid the prime contractor for said cloth at the rate of $3.20

per yard, or $23,817.20 plus $597.19 carrying charges for the five months said cloth had been held by appellant for delivery; that the original contractor falsely stated to appellant that the United States had paid him only at the rate of $2.50 per yard for said cloth furnished by appellant, and appellant accepted this sum because of the false representations of the original contractor to that effect; that thereafter the United States learned of the original contractor's action and required it to refund the amount not paid over to the subcontractor, which amount was covered into the Treasury; that under the contract between appellant and the original contractor the said original contractor agreed to pay appellant $3.20 per yard for the cloth so furnished.

The above-stated facts are admitted by the demurrer. Their admission establishes, as a matter of law, an implied contract and that the United States now holds in trust for appellant the sum of $5,210.02 (70 cents per yard) repaid said United States by the original contractor. This sum was exacted from the original contractor by the United States because of its fraud upon appellant and because of its failure to pay over said sum to appellant in accordance with the contract. The facts pleaded in the petition and restated *supra* incontestably show that money has been paid into the Treasury which legally belongs to appellant, and that the United States holds it merely as trustee. To continue to hold it would make the United States a party to the fraud in disregard of the principles laid down by this Court in the case of United States *vs.* State Bank, 96 U. S., 30, and also in Haupt *vs.* Horovitz, 120 S. E. (Ga.), 425; 27 Cyc., 857, 864; 2 Rul. Case Law, 778; Gaines *vs.* Miller, 111 U. S., 395; Ra-

borg *vs.* Peyton, 2 Wheat., 385; Leete *vs.* Pacific Mill Co., 88 Fed., 957; Metropolis Bank *vs.* Jersey City First Nat. Bk., 19 Fed., 301.

Respectfully submitted,

L. A. WIDMAYER.